U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: FEB 21 1989
CASE NO. 88-INA-0038

IN THE MATTER OF:
PRESBYTERIAN HOSPITAL,
Employer

on behalf of,

BOBAK NAYYERI,
Alien.

Appearance: David T. Hooper, Esq.

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill, Schoenfeld and Tureck Administrative Law Judges

MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

Presbyterian Hospital ("Employer") filed an application for labor certification on April 26, 1986, on behalf of Bobak Nayyeri ("Alien"), for the position of addictions counselor (AF 148-150). Employer's business is providing counseling for chemical dependency. The minimum education, training, and experience required by Employer for this job consisted of a Bachelor of Arts in behavioral sciences or human services, one year of approved chemical dependency training and experience of one year in the job offered or one year in a related occupation in an approved chemical dependency program. Special requirements for the job were as follows:

> Group skills in counseling and assessment. Certification in Alcoholism and Drug Dependency Counseling or in the process of obtaining certification. Position requires 2 years experience in Chemical Dependency Programs or one year in Chemical Dependency Program and 1 years training in an approved chemical dependency programs. Good sight and hearing. Two years of personal recovery if chemically dependent. Personal stability, Neat appearance. Ability to work within a team.
> Masters Degree in Behavioral Sciences or Human Services will be acceptable in lieu of one year of training or experience.
> Employer offers training as a resident or intern for potential employees.

On April 10, 1987, the Certifying Officer issued his Notice of Findings (NOF) (AF76-77), to which Employer timely submitted its rebuttal argument and evidence (AF 10-74). On May 12, 1986, a Final Determination was issued by the Certifying Officer in which he denied certification (AF 7-8).

Discussion

The Certifying Officer listed two violations in the Final Determination.[1] First, the Certifying Officer stated that Employer's unattested statement, unsupported by other substantiating evidence, was insufficient documentation that U.S. workers were rejected for lawful job-related reasons. Under the two regulations which address this issue, 20 C.F.R. §§656.21 (b)(7); and .21 (j)(1)(iv), an employer is required to state with specificity the reasons it did not hire each U.S. applicant who was interviewed and to document that U.S. workers were

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[1] In the Final Determination, the Certifying Officer did not address the fact that the NOF had directed the Employer to conduct interviews and that this direction was not complied with. Since the evidence of record established that each of these applicants had been interviewed prior to the issuance of the NOF and the subject was not addressed again in the Final Determination, we conclude that the Certifying Officer no longer deemed these interviews to be necessary.

rejected solely for lawful job-related reasons. Employer, in its rebuttal, explained its reasons for rejecting the six U.S. applicants indentified by the Certifying Officer in the NOF. Included were the following statements;

Sue Jennings	References confirmed her weakness was in confrontation skills. Indications were she could not lead confrontation groups. Appeared unwilling to confront issues during confrontations.
Dennis Lewelling	Stated in interview of 9/24/86 he does not like or do well with confrontational situations.
Susan ZumMallen	Weak confrontation skills. References confirm her communications problems. She has had previous problems with argumentative behavior with patients in other jobs.

This board has held that written assertions which are reasonably specific and indicate their sources or bases shall be considered documentation. Gencorp, 87-INA-659 (January 13, 1988). In this case, we find that the written evaluations are reasonably specific and indicate their sources, i.e., whether Employer's conclusions were based on an interview or on reference checks. There is no requirement in either regulation that a statement as to why U.S. workers were not hired must be attested to. We therefore find that Employer provided sufficient documentation under the standards set forth in Gencorp.

The remaining issue is whether the documented reasons for rejecting each U.S. applicant identified in the final determination are lawful and job-related. The Certifying Officer contends that four applicants meet Employer's minimum education and experience requirements and were therefore improperly rejected. This Board has held that an applicant is considered to be qualified for a job in terms of his or her education, training and experience if the applicant meets the minimum requirements specified for that job set forth in Item 15 as well as in Item 14 of the labor certification application. Bel Air Country Club, 88-INA-223 (December 23, 1988). Since none of the requirements, including the special requirements set forth in Item 15 of Employer's application, were found to be unduly restrictive, applicants who do not meet all the requirements are not qualified for the job. See, Concurrent Computer Corp., 88-INA-76 (August 19, 1988).

Employer points out that the offer of employment states clearly in Item 15 that the job requires the "ability to work within a team approach" and also calls for the counselor to be "skilled in group counseling skills and assessment." For the following reasons, we find that the three previously identified U.S. applicants were rejected for lacking job requirements which were not identified as such in either employer's application or in its job advertising.

Employer submitted two letters with its rebuttal argument that address the issue of why the U.S. applicants for the position were rejected. In a letter dated May 14, 1987, the personnel manager listed each applicant identified in the NOF and gave the specific reasons why he or she was not hired. Three such reasons are guoted above. In a May 11, 1987 letter (AF12), the personnel manager stated as follows:

> In the selection of employees for inpatient chemical dependancy, (sic) it is imperative that employees be able to work in a confrontive (sic) approach in dealing with addictive behavior. . . Another major aspect of the job is the ability to deliver public educational programs and have the outgoing personality to market our services.
>
> Our interviews attempted to elicit each applicant's ability to perform the above tasks in addition to the educational requirements of the job. . .
>
> The applicants. . . do not possess the confrontation skills nor the personality required of our counselors. It is for this reason and this reason alone that we did not select any of the aforementioned applicants.

The requirements set forth in this letter concerning (1) ability to use a confrontative approach in dealing with addicts, (2) the ability to deliver public educational programs, and (3) have an outgoing personality to market Employer's services are not identified as special requirements in Item 15 of its application. Employer here is treating them as minimum requirements since applicants were rejected for not having these capabilities. An Employer cannot reject a U.S. worker because he lacks a requirement which was not disclosed. Chromatochem Inc., 88-INA-0008 (January 12, 1989). It is incumbent upon an employer to state completely minimum job requirements which, if met by any applicant, imply that such a person will be able to perform the job. Vanguard Jewelry Corp., 88-INA-273 (September 20, 1988). In this case, Employer apparently considers its requirement "that employees be able to work in a confrontive approach in dealing with addictive behavior," to be subsumed in the Item 15 special requirement that the applicant "have the ability work within a team approach. . . and be skilled in group counselling skills and assessment." We find however, that if the ability to apply a specific counselling "approach" or method is considered to be imperative for the job it must be listed as a special requirement in Item 15. See, Prospect School, 88-INA-184 (December 20, 1988).

Furthermore, Employer did not reject these applicants solely for their lack of confrontive skills. The personnel manager's May 11th letter clearly indicates that they were also rejected because they lacked the "personality" to market Employer's services and deliver public educational programs. Marketing or sales ability were also not identified as requirements for this position. Therefore, Employer has failed to meet its burden of proof to show that the rejections of U.S. applicants were solely for lawful job-related reasons and it is thereby in violation of §656.21(b)(7). Accordingly, the request for alien labor certification was properly denied.

ORDER

The determination of the Certifying Officer denying labor certification is hereby AFFIRMED.

MICHAEL H. SCHOENFELD
Administrative Law Judge

MHS/MKG/mc